

BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A
JUDGE: CYNTHIA A. HOLLOWAY
NO.: 00-143

Florida Supreme Court
Case No.: SC00-2226

_____/

MOTION TO COMPEL

COMES NOW, the HONORABLE CYNTHIA A. HOLLOWAY, by and through her undersigned counsel and hereby files this Motion to Compel requesting this Hearing Panel to order Special Counsel to produce the witness interviews conducted by the Judicial Qualifications Commission and in support sets forth the following arguments.

(1) Pursuant to Florida Judicial Qualifications Commission Rule 12(b), Judge Holloway, through her undersigned attorney, provided a written demand for the "names and addresses of all witnesses whose testimony the Special Counsel expects to offer at the hearing, together with copies of all written statements and transcripts of testimony of such witnesses in the possession of the counsel of the Investigative Panel which are relevant to the subject matter of the hearing and which have not previously been furnished." (See Demand for Rule 12(b) Materials, dated November 7, 2000, attached as Exhibit A).

(2) In response to Judge Holloway's request, Special Counsel Beatrice Butchko provided a list of nineteen potential witnesses, transcripts of testimony given by Judge Holloway, a deposition transcript of John Yaratch and witness affidavits

originally submitted by Judge Holloway with her Answer to Notice of Investigation. In addition, Special Counsel provided a typed written statement of Sharron K. Cosby dated March 3, 2000.

However, Special Counsel did not disclose any statements of the remaining JQC witnesses. (See Special Counsel's Potential Witness List and Catalogue of Sworn Statements and/or Transcripts, dated December 8, 2000, attached).

(3) Judge Holloway's undersigned attorney has been contacted by several of the witnesses listed by the JQC who have stated that they have spoken to JQC's representatives concerning the subject matter of these proceedings prior to the Investigative Hearing that took place on October 13, 2000. Consequently, on January 3, 2001, Judge Holloway again made a written request for disclosure of the remaining witness statements citing to Rule 12(b).

(4) In the Special Counsel's response dated January 16, 2001, she acknowledged that the JQC has possession of typed witness interviews conducted by its investigator. Moreover, Special Counsel conceded that these interviews or statements were given at the direction of Mr. Thomas C. MacDonald, Jr., who was acting as the General Counsel for the Investigative Panel in this proceeding. Due to the bifurcated nature of the JQC proceedings, Mr. MacDonald's authority to direct the investigator to interview witnesses extended only until his assignment of

aiding the Investigative Panel in the filing of formal charges was completed. Consequently, these witness interviews were conducted for the purpose of considering whether formal charges should be filed against Judge Holloway.

Although these statements were, in large part, the basis for the formal charges, Special Counsel refused to comply with Judge Holloway's discovery request for witness statements. Interestingly, Special Counsel did not reference or even address Florida Judicial Qualifications Commission Rule 12(b) when justifying her refusal. Instead, Special Counsel relied upon the discovery provisions contained in the Florida Rules of Civil Procedure.

(5) Contrary to the Special Counsel's analogies, the Florida Supreme Court has held, "discovery pursuant to rule 12(b) allows an accused judge to have full access to the evidence upon which formal charges are based." See In re Graziano, 696 So. 2d 744, 751 (Fla. 1997) (*emphasis added*). In fact, the Graziano Court determined that these liberal discovery rights justify the continuing confidentiality of the original complaint. See Id. at 751-752. The only exception to the accused judge's entitlement to full disclosure of the written statements are any statements contained in a document that is confidential under the Constitution of the State. Fla. Jud. Qual. Comm'n R. 12(b). Special Counsel has not contended that any of these documents are

confidential. Therefore, the unequivocal language of Rule 12(b) mandates disclosure.

(6) Special counsel seeks to limit and qualify the term "statement" by making analogies to the Florida Rules of Civil Procedure and contending that the investigator's typed summaries are not statements according to the definition of "statement previously made" found within Florida Rule of Civil Procedure 1.280(b)(3). This subsection pertains to a non-party's right to receive a copy of a statement previously made by that non-party or a party's right to receive a copy of a statement previously made by that party. However, since Florida Judicial Qualification Commission Rule 12(b) already provides for the appropriate scope of discovery and application of additional restrictions is contrary to the intent of the Florida Supreme Court, the Florida Rules of Civil Procedure are inapplicable to the specific issue before the Hearing Panel.

Moreover, Florida Rule of Civil Procedure 1.280(b)(3) concerns materials that were prepared in anticipation of civil litigation. In contrast, the statements that are sought to be disclosed in this prosecution were taken at the direction of the General Counsel to the Investigative Panel prior to the determination that Formal Charges would be filed. The witness interviews constitute the Judicial Qualifications Commission's investigation and evidence of the basis for the underlying

charges rather than mere attorney work product undertaken in the anticipation of a trial. As such, Florida Rule of Civil Procedure 1.280(b)(3) should not be utilized to limit the holding of In re Graziano, 696 So. 2d 744 (Fla. 1997).

Assuming *arguendo* that the Hearing Panel finds it appropriate to apply the definition of "a statement previously made" found within Rule 1.280(b)(3) to Judicial Qualifications Commission investigations, the statements given to the JQC investigator appears to meet criteria set forth in that subsection. Rule 1.280(b)(3) states in pertinent part the following:

For purposes of this paragraph, a statement previously made is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording or transcription of it that is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

Special Counsel has explained that Mr. MacDonald's investigator took handwritten notes during the witness interviews and later typed them for the prosecution's review. By this explanation, the witness statements were "transcribed" by the investigator who presumably gave a "substantially verbatim recital" of their statements and took notes contemporaneously with the making of the statement. Accordingly, by the Special Counsel's own argument, the statements should be disclosed.

In any event, a rigid application of this Florida Rule of

Civil Procedure 1.280(b)(3) definition to the disclosure of witness statements in JQC proceedings would encourage the ultimate circumvention of discovery obligations by a suggestion that the investigator refrain (at least contemporaneously) from taking notes of the witnesses statements. Not only would this practice prevent "full access to the evidence upon which the charges are based," but it would also create the substantial risk of submitting or arguing inaccurate witness statements to the Investigative Panel. See In re Graziano at 751. The ultimate goal of the discovery process in a JQC prosecution should not be the manipulation of discovery obligations to hinder the defense; but rather, to provide complete and accurate disclosure to ensure the fair presentation of evidence.

WHEREFORE, and by reason of the foregoing, Respondent respectfully requests this Hearing Panel to enter an order compelling the Special Counsel to produce all witness interviews conducted by the Judicial Qualifications Commission investigator in accordance with Florida Judicial Qualification Commission Rule 12(b) and the rulings of the Florida Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of _____, 2001, the original of the foregoing Motion to Compel has been furnished by U.S. Mail to: Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 with copies by U.S. Mail to: Beatrice A. Butchko, Esquire, Kaye, Rose & Maltzman, LLP, One Biscayne Tower, Suite 2300, 2 South Biscayne Boulevard, Miami, Florida 33131; John Beranek, Esquire, General Counsel, Ausley & McMullen, Washington Square Building, 227 Calhoun Street, P. O. Box 391, Tallahassee, Florida 32302; Honorable James R. Jorgenson, Chair, Hearing Panel, Third District Court of Appeals, 2001 S.W. 117th Avenue, Miami, Florida 33175-1716; and Michael S. Rywant, Esquire, Rywant, Alvarez, Jones, Russo & Guyton, P.A., 109 North Brush Street, Suite 500, P. O. Box 3283, Tampa, Florida 33601.

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